Petition

81-1184

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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

CHATHAM VENTURES, INC., ET AL.,
SCOTT THOMPSON and LAURIE K. ABBOTT,

Petitioners,

vs.

FEDERAL DEPOSIT INSURANCE CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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(A) Questions presented for review.

The issue is whether or not the District Court committed error in its ruling on the Motion for Summary Judgment in favor of the Appellee, FDIC, on the applicability of 12 U.S.C.A. 1923(e), thereby precluding Appellants, Scott Thompson and Laurie K. Abbott, from bringing their case for set off to trial because:

I) the asset was not purchased by FDIC in conjunction with the saving of an

insured bank,

ii) the asset was not purchased from an insured bank,

iii) the maker/obligor of the note was not a customer of an insured bank,

iv) the maker/obligor did not lend himself to any deceptive scheme that overstated the assets of the bank.

If 12 U.S.C.A. 1823(e) does apply, then the issue is whether or not Appellants have been deprived of a valuable property right, without notice and hearing, in violation of the due process clause of the Fifth Amendment to the United States Constitution and in contravention of the following decisions of the United States Court of Appeals for the Fifth Circuit and the Supreme Court of the United States:

Hornsby v. Allen, 326 F. 2d 605 (5th Cir. 1964);

Mathews v. Eldridge, 424 U.S. 319, 47 L.Ed. 2d 18, 96 S. Ct. 893 (1976);

Schroder v. N. Y., 371 U.S. 208, 9 L.Ed.

255, 83 S. Ct. 279, 89 A.L.R.2d 1398 (1962);

Mullane v. Central Hanover Bank & Trust Company, 339 U.S. 306, 94 L.E. 865, 70 S. Ct. 652 (1949).

(B) Parties.

The caption contains the names of all parties. Furthermore, Chatham Ventures, Inc. has no parent companies, subsidiaries or affiliates.

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(D) Opinion.

The Opinion of the District Court for the Southern District of Georgia was not reported. The Opinion of the Court of Appeals is reported at 651 F.2d 355 (1981).

(E) Jurisdiction.

The Judgment of the Court of Appeals for the Fifth Circuit was made and entered on July 20, 1981, a copy thereof is attached hereto in the appendix. A Petition for Rehearing was filed on August 3, 1981, denied by Order dated September 11, 1981, a copy of said Order is attached hereto in the appendix. The Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

(F) Statutes and Federal Rules Involved.

12 U.S.C.A. 1823(e).

(G) Statement.

In this Petition, Laurie Abbott and Scott Thompson will refer to themselves as "Petitioners", to Federal Deposit Insurance Corporation as "Respondent", to Hamilton National Bank as "HNB".

During late 1972 Petitioners and HMC discussed the assembling of various tracts of land in Savannah, Georgia to be used in a joint

development by Abbott, Thompson and HMC of a riverfront townhouse project. The joint venture was authorized with the Home Office of HMC. (R. 283, 286, 288, 292).

Based upon the joint venture agreement Petitioners assembled seven parcels of land on Wilmington Island, Chatham County, Georgia. Title to said property was to be taken in the name of Petitioners, and HMC was to lend 100% of the funds necessary to acquire, package, develop and build out said tract. HMC was to receive Twenty Per Cent (20%) of the profits from said development.

HMC advanced to the venture $284,950.00 in land acquisition funds and $15,250.00 in development funds.

By the summer of 1974, approximately 50 acres commonly known as the Green Cove Parcel had been acquired and rezoned to PUD. The necessary studies, surveys and topos were completed and the property was ready for development, reflecting a profit of between $1 and $2 Million Dollars.

On September 20, 1974 HMC advanced an addi-

tional $50,000.00 to cover part of the development expense, some interest and attorney's fees. Concurrently therewith Petitioners executed, individually, a note and debt deed to HMC in the amount of $350,000.00. The amount of the loan was to be $1,400,000.00, or $750,000.00 in two phases with interest at three per cent above prime with a buildout period of five years for the development of 400 riverfront townhouses.

When said loan matured on March 25, 1975, the property was packaged and ready for development. HMC had run out of money and breached the joint venture agreement by failing to fund the development loan.

On October 25, 1975, unknown to Petitioners, HMC transferred an undivided interest in the note and debt deed to HNB. HMC remained the holder-owner of the note. On February 16, 1976, HNB was declared insolvent, the Respondent was appointed receiver and the assets were transferred to the Respondent and to First Tennessee National Bank.

On February 20, 1976 HMC filed a bankruptcy proceeding in the United States District

Court for the Southern District of Tennessee. On March 29, 1976 HMC petitioned to convert the bankruptcy proceedings to Chapter XI proceedings.

On December 5, 1977 HMC negotiated by indorsement the Petitioners' note to Respondent and transferred its interest in the joint venture to Respondent. At this time, the Respondent became the holder-owner of the note, one year and nine months after the Respondent bailed out HNB.

On May 30, 1978 Respondent demanded payment of the outstanding principal balance and accrued interest.

On June 13, 1978, Petitioners filed a suit in the United States District Court for the Southern District of Georgia against Respondent and HMC seeking to enjoin the foreclosure sale of the Green Cove Parcel, seeking to recover damages for HMC's negligent misrepresentation as to its financial status, and seeking damages for HMC's breach of the joint venture agreement to fund the Green Cove development loan.

Respondent counterclaimed for principal,

accrued interest, and attorney's fees on the Green Cove parcel note.

On October 31, 1979, the Respondent filed a Motion for Summary Judgment. On November 20, 1979, Petitioners responded in opposition to Respondent's Motion for Summary Judgment.

On January 11, 1980 the Court in entering its Order on said Motion for Summary Judgment held that assuming a joint venture between HMC and Petitioners did exist, the protection afforded the Respondent by 12 U.S.C.A. §1823(e) compelled the Court to rule in favor of the Respondent.

On appeal the Court of Appeals for the Fifth Circuit, Unit B, affirmed. The Fifth Circuit held that the fact that the Respondent acquired from HNB a 97.45% interest in the Petitioners' security deed and promissory note rather than a full 100% interest did not preclude it from invoking the protection of §1823(e), and the acquisition of the remaining 2.55% interest was in aid of the earlier purchase and was acquired pursuant to proper use of the Respondent's powers.

(H) Existence of Jurisdiction Below.

The District Court for the Southern District of Georgia, Savannah Division, had jurisdiction over this claim under 12 U.S.C. §1819.

(I) Argument

I

This Court should review the decision of the District Court and of the Court of Appeals for the Fifth Circuit which have decided an important question of federal law dealing with 12 U.S.C.A. §1823(e).

A condition precedent to the Respondent taking an asset under the protection of §1823(e) is that it will facilitate the saving of an insured bank. The Respondent acquired HMC's holder status in the note 21-1/2 months after the assets of HNB had been transferred to First Tennessee National Bank and Respondent. Therefore, the Respondent did not acquire the note pursuant to the saving of an insured bank.

On October 25, 1975 HMC assigned a 97.45% interest in the note to HNB (R. 73). On December 5, 1977 Kyle Weems as Trustee in possession of HMC negotiated by endorsement said note

to the FDIC (R. 257).

The October 25th assignment did not convey a holder status in the Note to HNB. Section 109A-3-202(1), Code of Georgia Ann. provides:

> "Negotiation is the transfer of an instrument in such form that the transferee becomes the holder."

A partial assignment is not an effective negotiation. Section 109A-3-202(3), Code of Ga. Ann. provides:

> "An indorsement is effective to negotiate only when it conveys the entire instrument or any unpaid residue. If it purports to be of less it operates only as a partial assignment."

Section 109A-3-201(3), Code of Ga. provides:

> "Negotiation takes effect when the indorsement is made and until this time there is no presumption that the transferee is the owner."

HMC continued to be the holder-owner of the note from October 25, 1975 until December 5, 1977 whereupon the note was negotiated by indorsement to Respondent.

The practical effect of this result is that only HMC could bring suit alone on the note since it was the holder of the note. Section

109A-3-301, Code of Georgia Annotated provides:

> "The holder of an instrument whether or not he is the owner may transfer or negotiate it and . . . discharge it or enforce payment in his own name."

Prior to December 5, 1977 the Respondent did not have such an interest as could be enforced by an action at law. In fact the only way the interest could be enforced is by a suit "in equity" and then HMC would have to be joined. Graham v. Southern Railroad Co., 173 Ga. 573, 161 SE 125 (1931).

Therefore, HMC was an essential party to any proceeding to enforce the note and Petitioners would have been entitled to plead set off for breach of the joint venture agreement.

To apply §1823(e) to the purchase of the partial interest in the note as of February 26, 1976, would be to afford HMC, a private corporation, the protection of §1823(e). This is not what Congress mandated. By the enactment of §1823(e) Congress intended to afford only the Respondent in its corporate capacity such protection when purchasing an asset from a financially troubled bank.

The Court of Appeals in denying Petitioners' contentions in this regard holds that the Respondent could enforce the note by joining HMC in a suit in equity. Although this is procedurally correct, a court of equity will not enforce rights under a partial assignment unless it can do so without working a hardship on the debtor. 6A C.J.S. Assignments. §12; 80 ALR 407 at p. 423; Graham v. Southern Railway, supra.

Since as Petitioners hereinafter contend the purchase of the assets was not within §1823(e), a court of equity could consider all the intervening equities between the parties.

The Court of Appeals further held in footnote 5 at page 9464 of the opinion that the " . . . statutory protection would not necessarily extend to HMC as well." At oral argument the Court of Appeals acknowledged that by the very nature of this transaction the note in question was "more valuable to the FDIC than to HMC." The note is secured by valuable real property. If HMC sought to enforce the note it would be subjected to a valid counter claim by Appellants seeking set off against the note and

an affirmative recovery. However, once the FDIC acquired the note it claimed the protection of §1823(e). The only way that Petitioners could assert their claim was by set off against a note secured by valuable property. This claim has been nullified by the decision of the Court of Appeals. Therefore, no matter what niceties are applied to the question, the practical effect is inescapable. HMC's assets were preserved and their liability is shielded by §1823(e). Again, this is clearly contrary to Congressional intent.

II

Furthermore, §1823(e) requires that an asset be purchased from an insured bank. As hereinbefore set forth, HMC remained the holder of the note until 21-1/2 months after the assets of HNB were transferred to First Tennessee National Bank and FDIC. HNB was never the holder of Petitioners' note. Hence the Respondent did not purchase the note from an insured bank, but from HMC, a private corporation. (R. 255-258). Therefore, the purchase was not within the provisions of §1823(e).

The Court of Appeals in rejecting this argument held that the Respondent acquired an interest in the note under those powers given by §1823(e) and the acquisition of the remaining 2.55 per cent interest was proper within its incidental powers under 12 U.S.C.A. §1819.

Petitioners do not contend that Respondent did not have the right or power to purchase the 2.55 per cent interest from HMC.

Rather, it is respectfully contended that when Respondent purchased the 2.55 per cent interest from HMC it could not purchase it under the protection of §1823(e) because the statute provides:

> ". . . Whenever in the judgment of the Board of Directors such action . . . will facilitate the sale of the assets of an open or closed insured bank to and assumption of its liabilities by another insured bank . . . the Corporation may . . . make loans secured in whole or part by assets of an insured bank . . . or . . . purchase any such asset . . . or . . . guarantee any other insured bank against loss by reason of its assuming the liabilities in purchasing the assets of an open or closed insured bank."

Thus, while it is clear that under the enabling clause of 12 U.S.C.A. §1819, Respon-

dent has the power to purchase the asset, nevertheless the purchase of the remaining 2.55 per cent interest failed to place Respondent within the safe harbor provisions of §1823(e). The Respondent acquired a holder status in the note over 21 months after the transfer of the assets and liabilities of the failed bank. Therefore, since Respondent did not purchase the note from an insured bank, but rather from HMC, a private corporation, on December 5, 1977 (R. 255-258), the asset was not purchased pursuant to the provisions of §1823(e).

FDIC v. Kucera Builders, 503 F. Supp. 967, 970 (N.D. Ga. 1980) and FDIC v. Hoover-Morris Enterprises, No. 78-1782A (N.D. Ga. March 25, 1980), Aff'd 642 F.2d 785 (5th Cir. 1981) cited in Footnote 8 as the basis for the Court of Appeals' conclusion did not raise these same points as acknowledged by the Court during oral argument and, therefore, should not be used as precedence.

III

Petitioners further contend that §1823(e) requires that the maker/obligor of the note be

a customer of an insured bank. Section 1823(e) is a codification of this Court's decision in D'Oench, Duhume & Co., Inc. v. FDIC, 315 U.S. 477, 86 L.Ed. 956, 62 S. Ct. 676 (1942). According to the D'Oench decision and its progeny and the Congressional debate surrounding the adoption of the statute (86 Cong. Record 10731 (1950)) the statute was enacted to provide for the type of transactions whereby collateral, secret agreements are made at the same time the note is executed between the bank and the maker of the note.

In the case at bar, Petitioners cannot be held to be customers of the bank by any interpretation. The note was executed with a mortgage company which cannot avail for its assets the protection afforded by Title 12 to the assets of an insured bank.

The Court of Appeals rejected Petitioners' arguments holding that the "authority offered in support of this proposition does not compel the proffered conclusion." The Court went on to hold that the FDIC's statutory protection

applies to notes on which the bank was not the initial obligee citing FDIC v. Hoover-Morris Enterprises, supra, as controlling authority.

It is respectfully submitted that even if the authority submitted by Petitioners does not compel the proffered conclusion it rebuts any authority heretofore submitted by Respondent. Moreover, the Hoover-Morris case relied upon by the majority opinion does not control the instant case as stated by Judge Clark in his concurring opinion. Judge Clark further advocated that:

> "The alleged side agreement there involved an agreement on the part of the mortgage company to accept a deed from the mortgagors as payment for the secured debt in lieu of foreclosure. That agreement was not made contemporaneously with and as part of the consideration of the initial loan, but was made only after the debtor defaulted. Our case differs and applies the statute to an agreement made contemporaneously with the loan and made a part of the entire loan transaction . . . . I do not believe that Congress intended the statute to reach an agreement made between an obligor and an obligee which contains covenants on the part of the obligee as well as the obligor, arising in transactions that do not involve a national bank at the time of the making of the loan agreement."

For the foregoing reasons, the statute should not apply to the agreement between Petitioners and HMC.

IV

Moreover, Section 1823(e) and the cases require that the maker/obligor lend himself to a deceptive scheme whereby the assets of the bank will be overstated.

As espoused in the D'Oench case:

> ". . . the test is whether the note was designed to deceive the creditors or the public authority or would tend to have that effect. It would be sufficient in the type of case that the maker lent himself to a scheme or arrangement whereby the banking authority on which respondent relied in insuring the bank was or was likely to be misled." D'Oench v. Duhme, supra....at p. 963.

The case of FDIC v. Meo, 505 F.2d 790 (9th Cir. 1977) is consistent in this manner. The court in analyzing the D'Oench rule and applying it to their case held:

> "We conclude that a bank borrower who was neither a party to any deceptive scheme involving, nor negligent with respect to circumstances giving rise to the claimed defense to his note is not estopped from asserting such defense against the bank's receiver."

Petitioners were not a bank borrower and were neither a party to any deceptive scheme involving nor negligent with respect to circumstances giving rise to the defense to their note. Query: How can one lend himself to a scheme or arrangement likely to mislead a banking authority when one never even dealt with a bank?

In addressing this issue the Court of Appeals held that the FDIC may invoke the defense of Section 1823(e) against an oral side agreement that by its nature would tend to mislead the FDIC.

Petitioners contend that the Respondent was never mislead. In fact, at the time that a partial interest in the note was assigned to the bank, the note was in default. Petitioners cannot believe that a bank examiner would assign any value to the note at that time. Furthermore, as hereinafter set forth in part V of this petition, when the FDIC was appointed receiver of the bank they had full knowledge of the defenses asserted by Petitioners.

It is respectfully submitted that in any case in which this argument has been raised, the courts have summarily disposed of this issue. However, this Court is not bound by any authority heretofore asserted. Petitioners appeal to the broad powers vested in this Court to fully consider the intervening equities between the parties in enunciating a fair interpretation of §1823(e).

As in the Meo case, appellants should not be estopped from asserting such defense against the Respondent.

V

The District Court in its Order presumed that a right of set off existed because of the breach of the joint venture agreement by HMC. (R. 407).

Petitioners contend that the application of §1823(e) to the note in question deprives them of due process of law under the 5th Amendment to the United States Constitution because the transfer of the note to a bank deprived the obligors of a right of set off without notice and an opportunity for hearing.

The Court of Appeals held that only upon acquisition of an interest in the note by the Respondent did §1823(e) become applicable. Hence Federal governmental action was not involved until this point and due process does not require that the obligors be parties to a hearing at the time of a transfer. The Court of Appeals held that subsequent judicial proceedings would serve to safeguard any substantive rights the obligors possess.

Petitioners contend that the Court's reasoning is in error. It is respectfully submitted that the arm of the federal government becomes involved from the moment any entity protected by the federal banking laws acquires an asset and it is at this crucial point that notice and hearing must be accorded to interested parties. Otherwise, there is never any opportunity to comply with the statute in satisfying the terms of §1823(e) rendering useless any subsequent judicial proceedings.

The Petitioners never knew a portion of the note was assigned to the bank. After

learning of the Respondent's acquisition of a portion of the note Petitioners brought to the attention of Mr. Baker, the FDIC liquidator for HNB, their claim for damages arising from the breach of the joint venture agreement. The record shows undenied that Mr. Baker was already aware of the set off claim of Petitioners (R. 271-277; Deposition of Mike Lee, pp. 23-24; 27-28 and Deposition of Laurie Abbott, pp. 81-82; 88-89). Hence the Respondent was aware of the failure to fund claim of Appellants and the underlying joint venture agreement made a part of the entire loan transaction. The trial court, while acknowledging that a written agreement is not required for a joint venture, held that obligors were precluded from asserting their claims because they had not complied with §1823(e). Therefore, it is evident that Petitioners were not free to make out their case in any manner they chose, but were rather precluded from the outset by the retroactive application of §1823(e).

This Court of Appeals' affirmance of the District Court's decision is contrary to its

own opinion in Hornsby v. Allen, 326 F.2d 605 (5th Cir. 1964) and many decisions of this Court, including Mathews v. Eldridge, 424 U.S. 319, 47 L.Ed.2d 18, 96 S. Ct. 893 (1976). Schroder v. N. Y., 371 U.S. 208, 9 L.Ed.2d 255, 83 S. Ct. 297, 89 A.L.R.2d 1398 (1962), and Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 94 L.Ed. 865, 70 S. Ct. 652. These cases stand for the mandate of this Court that an elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice and the opportunity to be heard within a meaningful time and in a meaningful manner. Petitioners cannot imagine a more final proceeding than the acquisition of an interest in the note by the bank. It was only at this point that Petitioners could have complied with §1823(e) and, therefore, this was the only time in which notice and hearing could be given in a meaningful time and a meaningful manner. As the records show, Petitioners were never given notice of the partial assignment nor an opportunity to comply with the four requirements of

§1823(e).

Petitioners are in agreement with that portion of Judge Clark's concurring opinion which holds that Congress never intended the statute to reach an agreement made contemporaneously with the loan and made a part of the entire loan transaction arising in transactions that do not involve a national bank at the time of the making of the loan agreement. As Petitioners argued in their Appellate Reply Brief at page 12, no one would ever suspect that a note executed with a private mortgage lending firm would be partially assigned to a bank which failed and that interest would be acquired by the FDIC in its corporate capacity. As Judge Clark states, the Petitioners should not be required to anticipate the situation whereby the FDIC is a remote future assignee with special statutory defenses when the original obligee was a private mortgage lending corporation.

Since the majority opinion applies the statute in the face of such remote contingencies

it is respectfully submitted that the result permits an impairment of contracts which when applied to the federal government amounts to a taking without notice and hearing in violation of the Due Process clause of the 5th Amendment to the United States Constitution.

CONCLUSION

It is respectfully submitted that the resolution of questions presented on this Appeal should be heard before the United States Supreme Court. The majority's opinion in the Court of Appeals is unclear and invokes stare decisis through cases which have clearly not raised the same issues that Petitioners have and whose decisions reflect the same. Furthermore, the opinion contravenes settled constitutional law.

Although Petitioners' situation is similar to that of many obligors, not one case in any circuit in this country has raised the issues that are now before this Court. After the HMC bankruptcy many obligors were adversely affected by §1823(e), so a final resolution is important.

The uncertainty engendered by the Court of Appeals' opinion does not serve to clarify the controversy surrounding §1823(e), but rather subscribes to the statute a reach which permits impairment of contracts, promotes an unconstitutional taking of property without notice and hearing, and will no doubt further aggravate the controversy surrounding the statute.

For the foregoing reasons Appellants urge this Court to exercise its discretionary jurisdiction and grant this petition for a Writ of Certiorari in order to enunciate a clear, uniform judicial expression as to the effect of §1823(e) that is consistent with our Constitution and Congressional intent.

(J) Appendix.

1. 12 U.S.C.A. §1823(e). Loans on assets as security:

(e) Whenever in the judgment of the Board of Directors such action will reduce the risk or avert a threatened loss to the Corporation and will facilitate a merger or consolidation of an insured bank with another

insured bank, or will facilitate the sale of the assets of an open or closed insured bank to and assumption of its liabilities by another insured bank, the Corporation may, upon such terms and conditions as it may determine, make loans secured in whole or in part by assets of an open or closed insured bank, which loans may be in subordination to the rights of depositors and other creditors, or the Corporation may purchase any such assets or may guarantee any other insured bank against loss by reason of its assuming the liabilities and purchasing the assets of an open or closed insured bank. Any insured national bank or District bank, or the Corporation as receiver thereof, is authorized to contract for such sales or loans and to pledge any assets of the bank to secure such loans.

No agreement which tends to diminish or defeat the right, title or interest of the Corporation in any asset acquired by it under this section, either as security for a loan or by purchase, shall be valid against the Corporation unless such agreement (1) shall

be in writing, (2) shall have been executed by the bank and the person or persons claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the bank, (3) shall have been approved by the board of directors of the bank or its loan committee, which approval shall be reflected in the minutes of said board or committee, and (4) shall have been, continuously from the time of its execution, an official record of the bank.

2. Order of the United States District Court for the Southern District of Georgia. (Page A-1 - A-11).

3. Judgment of the United States District Court for the Southern District of Georgia. (Page A-12 - A-14).

4. Opinion of the United States Court of Appeals, Fifth Circuit, Unit B, now Eleventh Circuit. (Page A-15 - A-41).

5. Order of the United States Court of Appeals, Fifth Circuit, Unit B, now Eleventh Circuit, denying Petition for Rehearing and

Petition for Rehearing en banc. (Page A-42 - A-43).

Joseph B. Bergen

CERTIFICATE OF SERVICE

The undersigned attorney for Petitioners hereby certifies that he has served three copies of Petition for Certiorari on counsel for Respondent, Federal Deposit Insurance Corporation, Leamon R. Holliday, III, Esquire, Bouhan, Williams & Levy, Post Office Box 2139, Savannah, Georgia 31498, by placing copies in the United States Mail, postage prepaid, this 18th day of December, 1981.

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Appendix

IN THE UNITED STATES DISTRICT COURT FOR THE

SOUTHERN DISTRICT OF GEORGIA

SAVANNAH DIVISION

SCOTT THOMPSON and LAURIE K. ABBOTT,	)	
Plaintiffs	)	
VS.	)	CIVIL ACTION NOS.
FEDERAL DEPOSIT INSURANCE CORPORATION,	)	478-133 & 478-174
Defendant	)	

O R D E R

Scott Thompson and Laurie K. Abbott have brought these actions seeking to enjoin the Federal Deposit Insurance Corporation ("FDIC") from foreclosing under a deed to secure debt on real estate owned by plaintiffs and to have the underlying debt declared void. Plaintiffs also seek damages for breach of an alleged joint venture agreement. Defendant FDIC has counterclaimed for judgment on the note. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331, 1332 and 12 U.S.C. § 1819. Currently pending is defendant FDIC's motion for summary

judgment and this Order constitutes the Court's ruling on defendant's motion.

FACTS

On September 20, 1974, Scott Thompson and Laurie K. Abbott executed a promissory note and a deed to secure debt to Hamilton Mortgage Company ("HMC") in the amount of $350,000. The term of the note was six months, maturing on March 20, 1975. The real estate deeded to secure the debt is approximately fifty acres of land known as the Green Cove Parcel located in Mayer Subdivision on Wilmington Island, Georgia. Plaintiffs contend that HMC made this loan in the capacity as a joint venturer with plaintiffs. The note, the deed, and the loan agreement make no reference to these parties being in such a relationship. The only reference to anything extraneous to the note and loan agreement is in paragraph 19(a) of the loan agreement which incorporated a September 5, 1974 commitment letter from HMC to Thompson and Abbott. The commitment letter was of a general nature expressing conditions regarding insurance, zoning, acceptance of the loan, etc.

Nothing mentioning nor giving rise to an inference of a joint venture was contained in the September 5th commitment letter. The loan matured on March 20, 1975.

On October 25, 1975, HMC transferred and assigned to Hamilton National Bank a 97.45% interest in the note and security deed. The Comptroller of the Currency declared Hamilton National Bank insolvent on February 16, 1976. The Federal Deposit Insurance Corporation was appointed receiver of the Hamilton National Bank. Pursuant to 12 U.S.C. § 1823(d) the FDIC, acting in its corporate capacity, purchased this 97.45% interest from the FDIC, acting in its capacity as receiver for Hamilton National Bank.

Hamilton Mortgage Corporation filed a petition in bankruptcy in the United States District Court for the Eastern District of Tennessee on February 20, 1976. Kyle R. Weems was appointed Trustee of Hamilton Mortgage Corporation and acquired title to HMC's assets. On March 29, 1976, HMC petitioned to convert

the bankruptcy proceedings to a Chapter XI proceeding. Kyle Weems continued as Trustee and on December 5, 1977, the FDIC, in its corporate capacity as liquidator, acquired the remaining 2.55% interest in the note and security deed from Weems. On May 30, 1978 defendant FDIC demanded payment of the outstanding principal balance and accrued interest.

On June 7, 1978, Chatham Ventures, Inc., Scott Thompson and Laurie K. Abbott filed suit in the Superior Court of Chatham County, Georgia against the FDIC and HMC seeking to enjoin the foreclosure sales of the Green Cove Parcel and other Wilmington Island realty not subject to the action at bar, seeking to have the September 20, 1974 debt declared void ab initio as being usurious under Georgia law, seeking to recover damages for HMC's alleged negligent misrepresentation as to its financial status and seeking damages for HMC's breach of an alleged joint venture agreement to fund development and construction of the Green Cove parcel.

On June 13, 1978, Chatham Ventures, Laurie

Abbott and Scott Thompson filed an action similar to the Superior Court action in this Court against FDIC, HMC and Manufacturer's Hanover Trust Company. The allegations were identical except for plaintiffs alleging that FDIC now stood in the shoes of Hamilton Mortgage Company thus making it liable for HMC's breach of the alleged joint venture. Defendant FDIC removed the Superior Court action to this Court and the two cases have been consolidated. FDIC counterclaimed in both actions for the principal and accrued interest on the Green Cove Parcel note.

Prior to answering the Superior Court and Federal Court actions, HMC commenced a proceeding in the Bankruptcy Court for the Eastern District of Tennessee seeking a determination that the Superior Court and District Court claims against HMC by Chatham Ventures, Inc., Scott Thompson and Laurie Abbott had been resolved in prior bankruptcy proceedings. The Bankruptcy Court entered a preliminary injunction enjoining the prosecution of the actions in this Court.

On December 21, 1979 the Bankruptcy Court approved a settlement of the disputes and claims between plaintiffs Chatham Ventures, Inc., Scott Thompson and Laurie K. Abbott and Hamilton Mortgage Corporation. A covenant not to sue HMC on any and all claims arising from transactions involving the Wilmington Island realties was one of the terms of the settlement. As a consequence of this settlement, three parties remain in this consolidated action. The three parties are plaintiffs Abbott and Thompson and defendant FDIC. The issues to be resolved are: 1) whether plaintiffs may assert the breach of the alleged joint venture agreement by HMC against FDIC to offset the indebtedness; and 2) whether the terms of the September 20, 1974 loan are usurious.

CONCLUSIONS OF LAW

The Court reserves ruling on the usury issue until a later date and in this Order addresses only the issue of breach of the joint venture. Plaintiffs contend the joint

venture relationship between HMC and themselves existed prior to September 20, 1974, the execution date of the loan. Whether or not a joint venture existed between the parties is not a determination the Court has to make in ruling upon defendant's motion. Assuming that a joint venture between HMC and plaintiffs did exist the Court finds the protection afforded the FDIC by 12 U.S.C. § 1823(e) compels the Court to rule in favor of defendant FDIC.

Plaintiffs allege the joint venture arrangement was for Abbott and Thompson to package the land and HMC to fund the development. The alleged joint venture arose from plaintiffs' contacts with Craig Meyer, Assistant Vice-president and Manager of the Savannah office of HMC. According to plaintiffs, in late 1972 or early 1973 Thompson and Meyer discussed the assembling of various tracts of land for a townhouse project on Wilmington Island. Towards this end title to the Wilmington Island property would be in the name of Thompson and Abbott and allegedly HMC would lend 100% of the

funds necessary to develop the tract. HMC's share of the profits was to be twenty per cent (20%). Plaintiffs' position is the September 20, 1974 note was executed in furtherance of this joint venture, and that thereafter HMC ran out of money when the property was packaged and ready for development. The Court realizes that a written agreement is not required for a joint venture; however, what is required for an agreement to be valid against the FDIC, when the FDIC occupies the position of liquidator as it does in this situation, is:

> the agreement ... (1) shall be in writing, (2) shall have been executed by the bank and the person or persons claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the bank, (3) shall have been approved by the board of directors of the bank or its loan committee, which approval shall be reflected in the minutes of said board or committee, and (4) shall have been, continuously from the time of its execution, an official record of the bank. 12 U.S.C. § 1823(e).

The purpose of § 1823(e) is "to insure that the FDIC, when it expends moneys intrusted to it to purchase assets of a closed insured bank, can rely on the bank's records and will not be

risking an impairment of the assets through an agreement not contained in the bank's records." FDIC v. Vogel, 437 F. Supp. 660, 663 (E.D.Wis. 1977). The statute effectuates a federal public policy to protect the funds of depositors in federally insured banks. Riverside Park Realty Co. v. FDIC, 465 F. Supp. 305, 313 (M.D. Tenn. 1978). This federal policy gives the depositor a status superior to the borrower.

In the instant situation nothing exists on the records of Hamilton National Bank to give the FDIC notice of this joint venture agreement. Any simple reference to the joint venture in the loan agreement or the deed to secure debt would suffice to meet the requirements of § 1823(e). See, Riverside Park Realty Co. v. FDIC, 465 F. Supp. 305, 312-313 (M.D.Tenn. 1978).

Plaintiffs argue that § 1823(e) is limited to protecting the FDIC in the situation where a customer of the bank has lent himself to a secret agreement or scheme whereby a public banking authority might be deceived or misled. Plaintiffs rely on D'Oench, Duhme & Co., Inc.

v. FDIC, 315 U.S. 447 (1942) and FDIC v. Meo, 505 F.2d 790 (9th Cir. 1977). While the Court recognizes that the D'Oench litigation gave rise to Congressional enactment of § 1823(e) and that D'Oench did involve a secret agreement whereby the FDIC would be deceived, the Court finds that § 1823(e) is not and has not been limited in its application to the D'Oench type situation where a secret agreement or scheme may result in the banking authority being deceived. See FDIC v. Vogel, 437 F. Supp. 660 (E.D.Wis. 1977) (breached oral promise by bank officials did not defeat the rights of the FDIC to recover under § 1823(e)); Dasco, Inc. v. American City Bank & Trust Co., 429 F. Supp. 767 (D.Nev. 1977)(§ 1823(e) protection prevails over an oral agreement making the maker's liability on the note conditional); and FDIC v. Smith, 466 F. Supp. 843 (N.D.Ga. 1979) and FDIC v. James T. Barry Co., 453 F. Supp. 81 (E.D.Wis. 1978)(§ 1823(e) insulates the FDIC in its capacity from any claims the borrower may have had against an insolvent bank).

Plaintiffs' reliance on FDIC v. Meo, 505 F. 2d 790 (9th Cir. 1974) is misplaced. While the Meo court stated, "A bank borrower who was neither a party to any deceptive scheme involving, nor negligent with respect to, circumstances giving rise to the claimed defense to his note is not estopped from asserting such defense against the bank's receiver." (Emphasis supplied). Infra, at 793. The Meo decision makes no mention of § 1823(e); this is due to the FDIC occupying the role of receiver instead of the role of liquidator which it occupies in the present situation. For that reason Meo is inapplicable to the case at bar.

The Court finds that plaintiffs Thompson and Abbott may not assert this breach of a joint venture against defendant FDIC and it is hereby ordered that defendant's motion for partial summary judgment be granted with the issue of usury remaining to be resolved.

This January 11, 1980.

/s/ B. Avant Edenfield
JUDGE, UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

SCOTT THOMPSON and LAURIE K. ABBOTT,	)	
Plaintiffs,	)	CIVIL ACTION NOS.
VS.	)	478-133 & 478-174
FEDERAL DEPOSIT INSURANCE CORPORATION,	)	
Defendants.	)	

JUDGMENT

WHEREAS this court entered judgment on the 25th day of July, 1980 for the Defendant against the Plaintiffs and whereas it has appeared that there was a clerical error in the judgment,

IT IS HEREBY ORDERED AND ADJUDGED that the judgment entered on the 25th day of July, 1980 is hereby amended nunc pro tunc so that the same shall read as follows:

"JUDGMENT

This court having previously rendered summary judgment against the Plaintiffs Scott Thompson and Laurie K. Abbott and for the Federal

Deposit Insurance Corporation on its counterclaim,

IT IS HEREBY ORDERED AND ADJUDGED that the Federal Deposit Insurance Corporation recover and have judgment against the Plaintiffs Scott Thompson and Laurie K. Abbott, jointly and severally, for the sum of $350,000.00 as principal plus $10,176.33 as further advances of principal plus interest of $26,667.28 due at maturity and further interest at 20% to the date hereof of $376,396.81 together with attorneys' fees on said amount, or $73,657.31.

FURTHER ORDERED that all injunctive relief is dissolved, that the Plaintiffs Thompson and Abbott recover nothing from the Federal Deposit Insurance Corporation and that the Federal Deposit Insurance Corporation recover its costs.

This 25th day of July, 1980."

SO ORDERED, this 7th day of August, 1980.

/s/ B. Avant Edenfield
B. Avant Edenfield, Judge
United States District Court

CHATHAM VENTURES, INC., et
al., Plaintiffs,

Scott Thompson and Laurie K. Abbott,
Plaintiffs-Appellants

v.

FEDERAL DEPOSIT INSURANCE
CORPORATION,
Defendants-Appellees.

CHATHAM VENTURES, INC., et
al., Plaintiffs,

Scott Thompson and Laurie K. Abbott,
Plaintiffs-Appellants,

v.

FEDERAL DEPOSIT INSURANCE
CORPORATION,
Defendant-Appellee.

No. 80-7599.

United States Court of Appeals,
Fifth Circuit.
Unit B

July 20, 1981.

Appeal from the United States District Court for the Southern District of Georgia.

Before TUTTLE, HILL and THOMAS A CLARK, Circuit Judges.

TUTTLE, Circuit Judge:

Once again this Court entertains a

challenge to the ability of the Federal Deposit Insurance Corporation (FDIC) to collect the balance due on a long overdue note. Obligors (Scott Thompson and Laurie Abbott), on September 20, 1974 executed a real estate note payable to Hamilton Mortgage Corporation in the amount of $350,000. This note was one part of the documentation for a transaction styled as an acquisition and development loan. Principal and interest were by the terms of the written agreement declared to be due on March 20, 1975. This money has never been paid, and the present action concerns the respective rights of the obligors and the FDIC, as present holder of the note.

Despite their failure to pay the note, the obligors claim that Hamilton Mortgage was the first party to breach the agreement. They claim that the written agreement was only a part of a larger joint venture agreement in which Hamilton Mortgage agreed to fund a total of $1,400,000 for development expenses for the property. When the property was ready for development in March of 1975, Hamilton Mortgage

which was approaching insolvency, did not advance further funds and this failure, according to the obligors, breached the joint venture agreement. It is this theory of the case that supports the obligors' refusal to pay the amount owed in the note and also their subsequent claim for damages.

The FDIC is now the holder of the note which it acquired through a complicated set of circumstances. On October 25, 1975, Hamilton Mortgage conveyed to Hamilton National Bank, which was approaching insolvency, a 97.45% interest in the security deed and promissory note executed by the obligors. On February 16, 1976, the receiver of Hamilton National Bank sold this 97.45% interest to FDIC in its corporate capacity. Hamilton Mortgage, on February 19, 1976, filed a voluntary petition for bankruptcy. On December 5, 1977, as a part of a settlement agreement relating to a dispute between the trustee and the FDIC, the bankruptcy trustee for Hamilton Mortgage transferred to the FDIC the remaining interest

in the deed and note.

The present legal proceedings commenced shortly thereafter. On May 30, 1978, the FDIC through its attorneys wrote the obligors demanding payment of the principal and interest. The obligors responded by filing this suit against the FDIC and others.[1] The amended complaint of the obligors challenged FDIC's right to collect on the note and asked for a total "set-off" of $1,335,000 against the $350,000 note. The FDIC answered the complaint and counterclaimed on the $350,000 note seeking principal, interest, attorneys fees, and costs. On January 11, 1980, the district court granted the FDIC's motion for summary judgment on the counterclaim. The district court found that the joint venture agreement could not be asserted against FDIC because of its statutory protection from unwritten side agreements to assets which it purchases, 12 U.S.C.A. §1823(e) (West 1980)[2], and the FDIC prevailed. From this judgment the obligors appeal.

1. Applicability of 12 U.S.C. § 1823(e)

This Court must first decide to what extent the FDIC may use its statutory shield, 12 U.S.C. § 1823(e). Plaintiffs-obligors claim that the FDIC is not shielded from any unwritten side agreements because of the manner in which the FDIC acquired the note. This procedure, obligors contend, strips FDIC of any statutory protection because the original purchase of the 97.45% interest did not result in the FDIC's physical possession of the note and the subsequent purchase of the 2.55% interest was not the purchase of an asset of an insured bank under the terms of 12 U.S.C. § 1823.

The obligors' first argument is that the statutory protection does not apply to the 97.45% interest acquired by the FDIC from Hamilton National Bank. The argument turns on the obligors' belief that FDIC was not a "holder" of the note having not acquired it through negotiation, and that under Georgia law, a partial assignment of a debt cannot be enforced in a court of law unless the debtor has consented to such an action. See Wilson v.

Etheredge, 174 Ga. 386, 387, 162 S.E. 707 (1932); Brown v. West, 35 Ga. App. 444, 133 S.E. 304 (1926).

[1] This argument is wholly misguided. The FDIC may purchase any asset of an insured bank.[3] See FDIC v. Abraham, 439 F.Supp. 1150, 1152 (E.D.La 1977); FDIC v. Rectenwall, 97 F. Supp. 273, 274 (N.D.Ind. 1951). Clearly the 97.45% interest was an asset; it was not worthless.[4] We reject the obligors' arguments directed at the applicability of section 1823(e) with respect to the 97.45% interest.[5]

Analysis of the remaining 2.55% interest requires an extension of our previous discussion. The obligors contend that this purchase was not from an insured bank and did not occur until over 21 months after the transfer of the assets and liabilities of the failed bank, Hamilton National, to another bank and the FDIC. The obligors, thus, question whether this purchase was made under the FDIC's power under 12 U.S.C. § 1823(e).

[2] We reject the obligors' argument. The FDIC, in this case, had already purchased

from the receiver of Hamilton National Bank an asset, a very large interest in a note, under its powers given by section 1823(e). The purchase of the remaining 2.55% interest and the physical acquisition of the note was clearly part of a transaction entered into in aid of the FDIC's earlier purchase of an asset of an insured bank when the purchase would facilitate the transition of that bank's business to a solvent bank.[6] The FDIC may "exercise ... all powers specifically granted ..., and such incidental powers as shall be necessary to carry out the powers so granted." 12 U.S.C.A. § 1819 (Seventh)(West 1980). The FDIC, then, acquired the note and the 2.55% interest in a proper use of its powers to aid the banking industry in event of a bank's insolvency.[7] The statutory protection of section 1823(e) shields the FDIC from defenses or claims raised with respect to "any asset acquired by it under this section." 12 U.S.C. § 1823(e). The use of incidental powers, which are necessary to carry out the specific powers of section 1823(e), is sufficient to make the acquisition in question

one that was made "under this section."[8]

Obligors also insist the statutory protection of section 1823(e) extends to the FDIC only if (1) the obligor in the note was a customer of the insured bank and (2) the obligor lends himself to a deceptive scheme that overstates the assets of the bank. They argue that neither test is met in this case because the obligor dealt only with the mortgage company, not the bank, and they had only innocent motives, lacking an intent to deceive.

[3] The obligors' first argument must fail. Their authority offered in support of this proposition does not compel the proffered conclusion.[9] On the other hand, this Court has previously reached this question and decided it contrary to the interpretation offered by the obligors. In FDIC v. Hoover-Morris Enterprises, 642 F.2d 785 at 788 (5th Cir. 1981), this Court held that "[t]he fact that [the obligors] dealt with Hamilton Mortgage, rather than the insolvent bank is of no consequence" in deciding whether the FDIC may invoke the protection of

section 1823(e). [10] This conclusion seems consistent with the language of the statute which makes no express exception for agreements initiated by a third party and the obligors.[11] Other courts have also reached the same conclusion that the obligor need not deal directly with the insured bank before the FDIC may invoke section 1823(e).[12] The obligors cannot succeed in this argument.

[4] The obligors' second argument must also fail. The statute, by its terms does not require that the obligor lend himself to a deceptive scheme in the sense of participating to perpetuate a fraud. The statute and the cases only require that the obligor lend himself "to a scheme or arrangement whereby the banking authority on which the FDIC relied ... was or was likely to be misled." D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, 460, 62 S.Ct. 676, 681, 86 L.Ed. 956 (1942). Of course if the obligors may assert oral side agreements reducing the value of the assets formerly held by the bank, then the FDIC would be misled.[13] This

Court holds in the manner most consistent with the statute, that the FDIC may invoke the defenses of section 1823(e) where the obligors seek to assert such an oral side agreement[14] that by its nature would tend to mislead the FDIC.

[5] The FDIC in this case correctly invoked its protection under section 1823(e). The obligors grudgingly admit that the joint venture agreement was oral. It thus fails to meet the statute's first requirement of a valid agreement assertible against the FDIC: that the agreement to be valid "shall be in writing." The obligors may not assert such an agreement against the FDIC and, thus, they present no issue of material fact in dispute. Under these circumstances, the district court's grant of summary judgment was proper and is affirmed.

2. Due Process

Obligors also contend that application of section 1823(e) to their case denies them due process of law under the fifth amendment to the United States Constitution. They argue that

they had no opportunity to create a valid agreement under section 1823(e), because they did not know that the partial interest in the note had been transferred to an insured bank until the FDIC had already acquired that interest. This procedure is unfair, they argue, because the transfers, which effectively deprived the obligors of "a right to setoff," occurred without notice and an opportunity for a hearing.

[6] We reject the obligors' due process argument that is based upon a lack of hearing or notice. The obligors cite case law concerning the process that is due when a person's rights are decided by a governmental body. Yet the obligors point to no specific instance where they were deprived of due process. A United States district court did judicially approve the sale of assets from the receiver of Hamilton National Bank to the corporate FDIC. In the Matter of the Liquidation of the Hamilton National Bank, Chattanooga, Tennessee, Civil No. 1-76-32 (E.D. Tenn. Feb. 16, 1976). Only upon that acquisition of an interest in the note by the FDIC did section 1823(e) become

applicable. Only at that point did any arm of the federal government even arguably first deprive the obligors of any rights. But due process does not require that the obligors be parties to a hearing at the time of the transfer. Subsequent judicial proceedings can safeguard any substantive rights the obligors possess.

"The special character of banks and the delicate problems involved in processing credit, justify denial of a judicial hearing which would be essential in other situations." A right to a hearing subsequent to the receivership and purchase and assumption transactions is adequate to protect[the obligor's] right to due process.

FDIC v. Lesselyoung, 476 F.Supp. 938, 945 (E.D.Wis. 1979), aff'd sub. nom. FDIC v. Lauterbach, 626 F.2d 1327 (7th Cir. 1980). Due process is satisfied by the subsequent proceedings held before the district court and this Court, where the obligors were free to make their case in any manner they chose. And only in those proceedings have their rights been finally adjudged.

[7] The obligors' argument also appears to have another component. At the transfer of the asset from Hamilton Mortgage Company to Hamilton National Bank they lost the ability to comply with the terms of the statute and they had no notice of the transfer until it was consummated. Although their argument is couched in terms of procedural due process, the obligors appear most disturbed by the substantive provisions of section 1823(e) that allow the retroactive alteration of parties' substantive rights[15] upon a transfer of an asset to the FDIC when an earlier and unnoticed transfer of the asset to an insured bank made possible the later transfer. We reject the obligors' argument, to the extent it questions the substantive provisions of section 1823(e) in this manner. When one makes a note, events beyond the obligor's control may alter his obligations or rights without notice to him. An analogy, although not perfect, is the holder in due course doctrine where a transferee may acquire greater rights against the obligor than the rights of

the original holder.[16] Clearly Congress may constitutionally enact reasonable legislation that shields the FDIC in this manner. We decline the obligors' invitation to declare the operation of this statute unconstitutional, either in whole or in part.

The judgment of the district court is AFFIRMED.

THOMAS A. CLARK, Circuit Judge, specially concurring:

While I concur in the result reached by the majority opinion I cannot subscribe to the scope of the opinion. I interpret 12 U.S.C. §1823(e) to immunize the FDIC, after it acquires assets from a bank which it insured and which is in receivership or liquidation, from any liability pursuant to an agreement between the insured bank and its customer if the agreement permits diminution in the value of an acquired asset, unless the agreement meets the requirements of the statute, that is, it must be executed in writing by the bank and the person claiming against the bank contemporaneously

with the acquisition of the asset by the bank, be approved by the bank's board of directors, and from the time of its execution be an official record of the bank.

This statute has a significant public policy purpose in protecting the FDIC and depositors of national banks. It protects the integrity of our national banking system by inhibiting a national bank from entering into an unrecorded collateral agreement with its customer, which could diminish an asset of the bank. By virtue of the statute a customer of a bank is on notice that if his loan transaction carries with it an obligation of the bank to be fulfilled during the term of the loan, the agreement must meet the criteria of the statute to be enforceable if the bank goes into receivership under the aegis of the FDIC.

I interpret the majority opinion to extend the statute to every such agreement as just described if a person's note becomes an asset of a bank, regardless of who the initial obligee is. The following simple example will illustrate my concern. Assume a mortgage company lends

one million dollars to a developer in consideration of a note secured by a mortgage on the developer's property, and contemporaneously writes a letter to the developer agreeing to lend to the developer 75% of the cost of improvements on the land upon certain described terms. Next assume that the mortgage company, to meet its own financial needs, assigns to a national bank the note and mortgage as collateral. Then assume that the mortgage company has financial difficulties, cannot pay the bank, and the bank acquires title to the note and mortgage. Assume further that the bank then goes into liquidation and the FDIC acquires the note and mortgage. The developer calls on the mortgage company, bank and FDIC to fulfill the obligation to fund the development, and the mortgage company and bank are unable to and the FDIC refuses. Upon subsequent litigation between the FDIC and the developer, the reach of the majority opinion forbids the developer from relying on his initial agreement with the mortgage company, which was part of the consideration of the loan.

Despite the public policy purposes of the statute, I do not believe that the statute reaches as far as the majority opinion takes it. Such a reach permits an impairment of contracts and in my opinion was never intended by Congress.

Respectfully, I recognize the majority opinion's reliance upon FDIC v. Hoover-Morris Enterprises, 642 F.2d 785 (5th Cir. 1981). While I do not think that opinion controls this case I concur in this case rather than dissent. The alleged side agreement there involved an agreement on the part of the mortgage company to accept a deed from the mortgagors as payment for the secured debt in lieu of foreclosure. That agreement was not made contemporaneously with and as part of the consideration of the initial loan, but was made only after the debtor defaulted. Our case differs and applies the statute to an agreement made contemporaneously with the loan and made a part of the entire loan transaction. Cf. Riverside Park Realty Co. v. FDIC, 465 F.

Supp. 305 (M.D. Tenn. 1978). For the foregoing reasons I do not believe Congress intended the statute to reach an agreement made between an obligor and an obligee which contains covenants on the part of the obligee as well as the obligor, arising in transactions that do not involve a national bank at the time of the making of the loan agreement. The obligor should not be required to anticipate the FDIC as a future assignee with the defenses contained in the statute.

FOOTNOTES:

1. One action was filed in state court and was removed upon petition of the FDIC. The other originated in the federal district court. The two cases were consolidated in the pretrial stages. Claims against defendants other than the FDIC have been dismissed without prejudice by order of the district court.

2. The FDIC's statutory protection provides that:

> No agreement which tends to diminish or defeat the right, title or interest of the Corporation in any asset acquired by it under this section, either as security for a loan or by purchase, shall be valid against the Corporation unless such agreement (1) shall be in writing, (2) shall have been executed by the bank and the person or persons claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the bank, (3) shall have been approved by the board of directors

of the bank or its loan committee, which approval shall be reflected in the minutes of said board or committee, and (4) shall have been, continuously, from the time of its execution, an offical record of the bank. 12 U.S.C.A. § 1823(e) (West 1980).

3. Of course certain conditions must be met. The statute provides that:

> ... Whenever in the judgment of the Board of Directors such action ... will facilitate the sale of the assets of an open or closed insured bank to and assumption of its liabilities by another insured bank .... [T]he Corporation may purchase any ... assets [of an open or closed insured bank]....

12 U.S.C. § 1823(e)(West 1980) (emphasis added). The obligors do not contest that the purchase of the 97.45% interest by the FDIC was purchased from an insured bank or that the purchase by the FDIC facilitated the sale of assets to and assumption of liabilities by another insured bank.

4. Georgia law would have allowed the FDIC as owner of a partial assignment of a note, rather than a holder of the note, to bring a suit in equity.

> It is ... well settled in this State that such an assignment is enforceable in equity, although the debtor may not assent, if all parties at interest are before the court, so that the right of each in the fund may be determined in one suit and settled by one decree.

Graham v. Southern Ry., 173 Ga. 573, 576, 161 S.E. 125 (1931). Any requirement that Hamilton Mortgage as assignor of a partial interest and holder of the note be joined in that suit does not alter the conclusion that the 97.45% interest already purchased by the

FDIC was an "asset" witin the meaning of the federal statute. The procedure required by state law might have made enforcement of the FDIC's rights more difficult but it did not make them worthless, and thus we need not decide what result would obtain if state law made the FDIC's rights worthless.

5. This conclusion does not, contrary to the obligors' contention "afford [Hamilton Mortgage,] a private corporation[,] the protection of 1823(e)." If an action had been brought on the note when Hamilton Mortgage owned a fractional interest in the note, the FDIC would have had its statutory protection, but that statutory protection would not necessarily extend to Hamilton Mortgage as well.

6. Hamilton Mortgage, the holder of both the note and the remaining interest in the note, filed a bankruptcy petition shortly after the FDIC's purchase from the receiver. Conflict developed between the trustee in bankruptcy for Hamilton Mortgage and the FDIC. The trustee questioned the interest asserted by the FDIC in many of the loans it had purchased from Hamilton National Bank. In addition, joint administration of the loans that were jointly owned by the trustee and FDIC was "very difficult" because those two co-owners were working at "cross-purposes" with the FDIC seeking to liquidate [the] assets as rapidly as possible" while the trustee pursued a goal that would take a longer period of time, the rehabilitation of Hamilton Mortgage for the benefit of the general unsecured creditors. Pursuant to a settlement agreement approved by the bankruptcy court, the trustee "sold and endorsed to"the FDIC its remaining interest in the obligors' note and assigned to the FDIC the deed to secure debt.

7. Cf FDIC v. Sumner Financial Corp., 451 F.2d 898, 900-03 (5th Cir. 1971)(quoting 12 U.S.C. § 1819 (Seventh) and concluding that "since Congress has entrusted the FDIC with the

regulation of ... bank interest rates and the advertisement of those rates, the FDIC has the power to make such rules as are reasonable and necessary to effectuate the purpose of the act").

8. Two district court opinions suggest the same result but do not indicate the reasoning behind their conclusions. See FDIC v. Kucera Builders, 503 F. Supp. 967, 970 (N.D.Ga. 1980); FDIC v. Hoover-Morris Enterprises, No. 78-1782A (N.D. Ga. March 25, 1980), aff'd, 642 F.2d 785 (5th Cir. 1981). Those cases arose out of similar transactions initiated by Hamilton Mortgage which made a partial assignment in a note to Hamilton National Bank. The FDIC subsequently played the same role in those transactions that it had in this case. Apparently the obligors in those cases questioned whether the FDIC's receipt of the note and partial interest in the note from the mortgage company, triggered the statutory protection of § 1823(a). In Hoover-Morris, the district court stated that:

> Pursuant to two transfers set out in the introduction, plaintiff Federal Deposit Insurance Corporation became the sole owner of the Note sued upon, and the deed of trust to secure payment of the Note. It owned the entire Note, not as a receiver, but in its corporate capacity. (Despite defendants' argument to the contrary, the material facts uncontroverted by defendants fully support this conclusion. See Local Court Rule 91.72). Under these circumstances, 12 U.S.C. § 1823(e) applies....

Id., slip op. at 4. The Fifth Circuit affirmance of this opinion does not refer to this issue. In Kucera Builders the district court stated that:

> Defendants argue, however, that despite the shielding effect of section 1823(e) in the above cases the affidavit filed by

> Richard Gaskill on behalf of the plaintiffs is insufficient to insure that section 1823(e)'s protective cover for the FDIC as liquidator of a failed bank is applicable here. Defendants contend that the affidavit of the liquidator does not show the existence of certain receiverships, certain situations which will facilitate a merger or consideration of an insured bank with another insured bank, or certain situations which will facilitate the sale of the assets of an open or closed insured bank to and assumption of its liabilities by another insured bank. Since these facts are absent, defendants argue, the shield of section 1823(e) cannot be used as the "no agreement which tends to diminish ..." language relied on by plaintiff is by its own terms only applicable to assets acquired by the FDIC under section 1823.
>
> The Court points defendants to paragraph 6 and exhibit A-4 in Gaskill's affidavit. That paragraph and the documents to which it refers clearly show that this case is one where the receiver or liquidator of an insured bank, closed on account of inability to meet the demands of its depositors, is entitled to offer the assets of the bank for sale to the FDIC as allowed by section 1823(d), and that such a transaction has herein occurred. The Court therefore finds no merit to defendants' first contention that section 1823(c) is inapplicable.

503 F.Supp. at 970. It is not clear that the defendants in Kucera Builders made the same arguments that the appellants in this case have made. This Court, however, has now specifically rejected those arguments.

9. The Court in D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447 [62 S.Ct. 676, 86 L.Ed. 956] (1942), a case that antedates the statute to be

construed, used language which may indicate that the Court was impressed by the fact that the maker had dealt directly with the bank. In addition, the obligors' cite to the Congressional debates where one representative discussed the effect of the statute on "agreements ... entered into between customers of the bank and the bank." 86 Cong. Rec. 10731 (1950). But neither citation disposes of the present case. The D'Oench Court did not face facts like those of the present case and did not need to reach the question. The legislative history is not dispositive because there is no indication in the language quoted by the obligors that the representative intended thereby to exclude agreements initially reached between obligors and a third party. Absent the presence of a fact pattern similar to the present case, one would naturally discuss the FDIC's defense in terms of agreements made between the bank and its customers because the bank would most often directly acquire the asset from the obligor.

10. We understand the concerns of Judge Clark who concurs specially. But we believe those issues he raises are settled by the rule of stare decisis.

Whatever might have been our view to the merits of the debate over whether the FDIC's statutory protection applies to notes on which a bank was not the initial obligee, this panel must follow the specific holding on this point by FDIC v. Hoover-Morris Enterprises, 642 F.2d 785 (5th Cir. 1981). The law of this Circuit is now clear. The statute applies to notes where a mortgage company was the original obligee and the insured bank acquires the obligation.

Judge Clark's difficulty with our holding relates to a separate question. He questions whether the statute would protect the FDIC from defenses and claims arising out of the same agreement of which the FDIC declares

against the obligors. The district court in Riverside Park Realty Co. v. FDIC, 465 F. Supp. 305 (M.D. Tenn. 1978), held that the statute did not protect the FDIC from such claims and defenses. This Court has previously reserved judgment on this question. See Black v. FDIC, 640 F.2d 699, 701 n.1. (5th Cir. 1981). The present appellant-obligors do not raise this issue on appeal to this Court. In fact, the obligors' brief describes the joint venture agreement as if it antedated the present note by almost two years. The note is apparently a self-contained agreement made without explicit reference to the alleged joint venture agreement. The obligors do not challenge the description offered by the district court.

> Plaintiffs contend that HMC made this loan in the capacity of a joint venturer with plaintiffs. The note, the deed, and the loan agreement made no reference to these parties being in such a relationship. The only reference to anything extraneous to the note and loan agreement which incorporated a September 5, 1974 commitment letter from HMC to Thompson and Abbott. The commitment letter was of a general nature expressing conditions regarding insurance, zoning, acceptance of the loan, etc. Nothing mentioning nor giving rise to an inference of a joint venture was contained in the September 5th commitment letter. The loan matured on March 20, 1975.

The present case, thus differs from the Riverside Park case where the district court described the asserted agreement as being a part of the note held by the FDIC.

> Defendants' attempt to characterize the agreement that plaintiffs claim has been breached as a separate and unrecorded agreement is totally unpersuasive. The deed of trust under which the FDIC now seeks to foreclose incorporates by reference "as if fully set forth" the terms of the

> loan agreement that plaintiffs allege were breached. Furthermore, the deed of trust note, which in essence is what the FDIC seeks to enforce through foreclosure, contains these very terms. Therefore, since plaintiffs are not asserting a separate agreement to defeat the rights of the FDIC, defendants' agreement that § 1823(e) applies must fail.

465 F.Supp. at 313 (footnotes omitted). The present obligors allege a breach of a joint venture agreement which is clearly separate from the note and deed held by the FDIC. The holding in Black v. FDIC, 640 F.2d 699 (5th Cir. 1981), forecloses the argument that such a joint venture agreement is the same agreement as the note. In that case, the written agreement to fund development loans was held on its face not breached by a failure to fund subsequent construction loans which were alleged to be understood to be a part of the entire real estate package. Any assertion of an unwritten agreement to fund such construction loans was then held barred by 12 U.S.C. § 1823(e). 640 F.2d at 700-02. In light of the Black court's reservation on whether the FDIC may use the statutory protection to shield itself from claims arising from the same agreement which the FDIC asserts against the obligors, the final holding of Black is clear. Any overarching unwritten agreement to complete a real estate deal is a separate agreement from a written note which in no manner refers to the larger asserted agreement. The Black case binds this Court on this issue even if the obligors had argued that a breach of the joint venture agreement was a breach of the note agreement upon which the FDIC seeks to recover.

11. The language of the statute indicates that any agreement is invalid unless it has been "executed by the bank" and the adverse claimants at the acquisition of the asset. 12 U.S.C. §1823(e). But this language in no manner limits the types of cases to which the section

applies, rather it limits the defenses that can be raised against the FDIC.

12. Howell v. Continental Credit Corp., No. 76-C-4542 (N.D. Ill. October 16, 1979), oral argument heard on appeal, No. 80-1566 (7th Cir. Jan. 16, 1981); FDIC v. C & A Carbone, Inc., No. 77-Civ.-1191 (S.D.N.Y. April 14, 1978).

13. Obligors' only case is from the Ninth Circuit, FDIC v. Meo, 505 F.2d 790 (9th Cir. 1974). That case is distinguishable from the present case. First, the Meo case did not interpret § 1823(e) because FDIC was acting only as a receiver of the insured bank. Second, Meo as interpreted by the Ninth Circuit does not allow obligors to assert an unwritten side agreement against the FDIC (even in its receiver capacity) when the loan proceeds are actually given over to the obligors. See FDIC v. First National Finance Co., 587 F.2d 1009, 1012 (9th Cir. 1978). Meo is, thus, inapposite where there is an unwritten side agreement and the obligors are aware that the agreement would not be discovered by the FDIC. Such facts fit the present case.

14. Two district courts in unpublished opinions have summarily rejected identical arguments by other obligors who asked those courts to create judge-made exceptions to the statute. See Howell v. Continental Credit Corp., No. 76-C-4542 (N.D. Itl. Oct. 16, 1979); FDIC v. C & A Carbone, Inc., No. 77-Civ-1191 (S.D.N.Y. April 14, 1978).

15. What the obligors must be claiming to have lost is the ability to "setoff" the breach of oral agreements against the holder of the note because § 1823(e) in no manner limits the obligors' recourse against the initial obligor in this case, Hamilton Mortgage. We assume but do not decide, that this is a sufficient property interest to invoke due process concerns.

16. The failure of an insured bank is an unexpected occurrence. The transfer of an asset to an insured bank that later fails is even more unexpected when the obligor originally signed the note with a mortgage company. Each occurrence, although unexpected, is possible in a modern commercial context. The obligors who wish to protect themselves in such a context should take precautions to ensure that neither a note nor an interest in a note will be transferred. The obligors might insert terms in the note making the rights under it non-transferable. Of course, the present obligors created a negotiable instrument which was more valuable to the original obligee and hence apparently more advantageous to the obligors. Future obligors might opt to follow the same course as the present obligors, but their decision is a calculated business risk which is comparable to the chance anyone takes when he creates negotiable paper.

Or in the alternative, such obligors might take steps to satisfy the terms of § 1823(e), a law which all parties are presumed to know. A giant step towards that end would have been to reduce the alleged oral agreement to writing. Having failed to claim any attempt at such protective measures, the present obligors fail to make a convincing argument that they have been denied due process by a statute that was on the books when their note was signed.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT B

No. 80-7599

CHATHAM VENTURES, INC., et al., Plaintiffs,

Scott Thompson and Laurie K. Abbott
Plaintiffs-Appellants,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION
Defendants-Appellees

CHATHAM VENTURES, INC., et al., Plaintiffs,

Scott Thompson and Laurie K. Abbott,
Plaintiffs-Appellants,

vs.

FEDERAL DEPOSIT INSURANCE CORPORATION
Defendant-Appellee

Appeal from the United States District Court
For the Southern District of Georgia

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion July 20,1981, 5 Cir., 1981, 651 F.2d 355).

Before TUTTLE, HILL and THOMAS A. CLARK, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge of this Administrative Unit in regular active service having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ James C. Hill
United States Circuit Judge

Opposition

Supreme Court, U.S.
FILED
APR 21 1982
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CLERK

No. 81-1184

In the Supreme Court of the United States

OCTOBER TERM, 1981

CHATHAM VENTURES, INC., ET AL., PETITIONERS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the provisions of 12 U.S.C. 1823(e) are effective to invalidate, as against the Federal Deposit Insurance Corporation, an oral agreement that tends to diminish or defeat the interest of the FDIC in an asset acquired from a failed bank, where the asset so acquired is an undivided partial interest in a note and the FDIC did not become the holder of the note itself at the time of acquisition.

2. Whether a 2.55% interest in a note acquired by the FDIC from a mortgage corporation is an asset protected by Section 1823(e), where the FDIC's purchase is in aid of its prior acquisition of the remaining interest in the note from a failed bank pursuant to Section 1823(e).

3. Whether Section 1823(e) is limited to agreements directly between the bank and its customers.

4. Whether Section 1823(e) protects the FDIC only from fraudulent schemes or secret transactions involving the failed bank.

5. Whether the operation of Section 1823(e) to defeat petitioners' claim against the FDIC's assets violates the Due Process Clause of the Fifth Amendment.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-15 to A-41) is reported at 651 F. 2d 355. The opinion of the district court (Pet. App. A-1 to A-11) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 20, 1981. A petition for rehearing was denied on September 11, 1981 (Pet. App. A-42 to A-43). The petition for a writ of certiorari was filed on December 7, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

12 U.S.C. 1823(e) provides in pertinent part:

> No agreement which tends to diminish or defeat the right, title or interest of the [Federal Deposit Insurance] Corporation in any asset acquired by it under

this section, either as security for a loan or by purchase, shall be valid against the Corporation unless such agreement (1) shall be in writing, (2) shall have been executed by the bank and the person or persons claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the bank, (3) shall have been approved by the board of directors of the bank or its loan committee, which approval shall be reflected in the minutes of said board or committee, and (4) shall have been, continuously, from the time of its execution, an official record of the bank.

STATEMENT

1. On September 20, 1974, petitioners Scott Thompson and Laurie Abbott executed a real estate note payable to Hamilton Mortgage Corporation (HMC) in the amount of $350,000 (Pet. App. A-16). The terms of the written agreement required payment of principal and interest on March 20, 1975, but no portion of the money due has ever been paid (*ibid.*).

On October 25, 1975, HMC conveyed to Hamilton National Bank (HNB) a 97.45% undivided interest in the security deed and promissory note executed by the petitioners (Pet. App. A-3). On February 16, 1976, the Comptroller of the Currency declared HNB insolvent and appointed the Federal Deposit Insurance Corporation (FDIC) to be its receiver. As authorized by 12 U.S.C. 1823(e), the FDIC, in its separate, corporate capacity, purchased this 97.45% interest from the FDIC in its capacity as receiver for HNB (Pet. App. A-3).

On February 20, 1976, HMC filed for bankruptcy in the United States District Court for the Eastern District of Tennessee. A dispute arose between FDIC and the trustee-in-bankruptcy for HMC, and, as a part of a settlement agreement resolving that dispute, the trustee on December

5, 1977, transferred to the FDIC the remaining 2.55% interest in the security deed and promissory note executed by petitioners (Pet. App. A-3 to A-4, A-17). On May 30, 1978, FDIC demanded the principal and interest due under the terms of the note from petitioners (*id.* at A-4).

2. On June 13, 1978, petitioners filed suit in the United States District Court for the Southern District of Georgia. The suit alleged, in pertinent part, that the written loan agreement was part of a separate, oral joint venture agreement between HMC and petitioners.[1] Under that agreement HMC was supposed to advance $1.4 million in addition to the loan for developing the property acquired with the loan (Pet. App. A-4 to A-5, A-16). Petitioners alleged that HMC failed to provide the promised funding for the development according to the joint venture agreement and that the breach of that agreement entitled petitioners to a "set-off" of $1,335,000 against the $350,000 note. The FDIC counterclaimed for the principal and interest due on the note (*id.* at A-18).

The district court granted the FDIC's motion for summary judgment on its counterclaim (Pet. App. A-1 to A-11). The court assumed for purpose of decision that the joint venture agreement existed, but held that, in order to assert it as a basis for defeating the FDIC's interest in the note, the joint venture agreement had to meet the requirements of 12 U.S.C. 1823(e), which it did not.

The court of appeals affirmed (Pet. App. A-15 to A-41). The court held that Section 1823(e) applied to the acquisition of petitioners' note. It rejected petitioners' argument that the status of the FDIC as a "holder" vel non of the note somehow affected the question of whether the FDIC's

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[1]Chatham Ventures, Inc. was the maker of certain notes to HMC which are no longer at issue in this case.

interest in the note was protected by Section 1823(e), and held that, in any event, the FDIC's 97.45% interest was an "asset" within the meaning of Section 1823(e) (Pet. App. A-19 to A-20). The court also rejected petitioners' related claim that the 2.55% interest in the note was not acquired under the authority of Section 1823(e) (Pet. App. A-20 to A-22). In addition, the court concluded that Section 1823(e)'s protection of the FDIC was not limited to transactions directly between a failed bank and one of its customers (Pet. App. A-22 to A-23) but rather extended to any agreement, regardless of whether a scheme was actually designed to deceive the failed bank (*id.* at A-23 to A-24). Finally, the court held that the operation of Section 1823(e) did not deny petitioners due process of law (Pet. App. A-24 to A-28).

Judge Clark wrote a separate concurrence (Pet. App. A-28 to A-32). Judge Clark concluded that a prior decision of the Fifth Circuit, *FDIC* v. *Hoover-Morris Enterprises*, 642 F. 2d 785 (1981), suggested that Section 1823(e) applied to the facts of this case, but he indicated that he did not believe that Congress intended the statute to bar claims based on transactions other than those between the failed bank and its customers (Pet. App. A-31).

ARGUMENT

1. Petitioners argue (Pet. 6-10) that because the FDIC did not actually acquire the note itself from HNB, but, instead, purchased a 97.45% undivided interest in the note, Section 1823(e) is inapplicable because, under Georgia law, FDIC was not a "holder" of the note at the time of the acquisition. The court of appeals properly rejected this argument as "wholly misguided" (Pet. App. A-20). As the court observed, Georgia law with regard to the status of the bank as a "holder" of the note did not render the 97.45% interest worthless, and thus, it clearly was an "asset" within

the meaning of the statute at the time of its acquisition, which is all that is required (Pet. App. A-20).[2]

2. Petitioners contend (Pet. 10-12) that the 2.55% interest in the note that was acquired from HMC's trustee-in-bankruptcy after the HNB had been insolvent for some time and its assets had been acquired by the FDIC is not subject to the protection of Section 1823(e). The court of appeals reasoned that the acquisition of the 2.55% interest was "part of a transaction" to protect "the FDIC's earlier purchase of an asset of an insured bank" and that the purpose of the entire transaction was to facilitate the purchase of the assets and the assumption of the liabilities of HNB by another insured bank, which is what Section 1823(e) is designed to accomplish (Pet. App. A-21 to A-22). Noting that the FDIC has been granted " 'such incidental powers as shall be necessary to carry out the powers * * * [specifically] granted' " to the FDIC (12 U.S.C. 1819 (Seventh)), the court below concluded that the acquisition of the 2.55% interest was

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[2]Petitioners' suggestion (Pet. 10) that the effect of this decision is to extend the protections of Section 1823(e) to the Hamilton Mortgage Corporation is inaccurate. The argument is based on a hypothetical suit between petitioners and the FDIC prior to the latter's acquisition of the final 2.55% interest in the note. In the hypothetical case HMC allegedly would be a party, *Graham* v. *Southern Ry.*, 173 Ga. 573, 161 S.E. 125 (1931), and thus a setoff of the claim against HMC's part of the interest might be possible. The problem with this theory is that no such suit occurred. That petitioners may be unable to obtain anything from HMC is not attributable to the operation of Section 1823(e), but rather to the insolvency of HMC.

Moreover, petitioners' claim that they could have recovered in such a suit is at best dubious. It is undisputed that the alleged joint venture agreement was to be performed over a period of at least five years and that it was not in writing (Pet. 3; Pet. App. A-24). These facts clearly render the alleged agreement unenforceable because the Georgia Statute of Frauds provides that any contract that is not to be performed within one year from the making thereof must be in writing. Ga. Code Ann. § 20-401 (1977).

incidental to and in furtherance of the earlier acquisition and that the asset was therefore acquired under Section 1823(e). This analysis is consistent with the language of Section 1823 and does not conflict with the decision of any other court.

Moreover, the situation in this case is unlikely to recur. There is little likelihood that the seller of a partial interest in a note will itself become insolvent at or near the time a bank is closed, and even if such an eventuality did occur, it is equally unlikely that the FDIC would resolve the problem by purchasing or otherwise obtaining the remaining interest in the note. When the FDIC purchases the assets of a failed bank, it is interested in liquidating them and not acquiring others. As the court of appeals found (Pet. App. A-22), FDIC entered into this unusual transaction with HMC's trustee only to protect the assets FDIC had already purchased. Because the decision of the court of appeals is reasonable and has a very limited reach, further review of this issue is unwarranted.[3]

3. Petitioners next contend (Pet. 12-15) that Section 1823(e) should only bar claims based on agreements between the failed bank and its customers and should not extend to agreements between third parties that are later transferred to the failed bank. Petitioners' argument, however, finds no support in the statute. The unambiguous language of Section 1823(e) provides that "*[n]o agreement* * * * shall be valid against the [FDIC] unless such agreement (1) shall be in writing * * *" (emphasis added). Indeed, every court that has considered this issue has

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[3]Even if petitioners were correct that Section 1823(e) ought not to bar their asserted setoff as to the 2.55% interest, they still would not recover on that basis because their claim, which is derived solely from the oral joint venture agreement, is clearly barred under the Georgia Statute of Frauds. See note 2, *supra*.

rejected petitioners' limited construction of the statute. See, *e.g.*, *FDIC* v. *Lattimore Land Corp.*, 656 F. 2d 139 (5th Cir. 1981); *FDIC* v. *Hoover-Morris Enterprises*, 642 F. 2d 785 (5th Cir. 1981); *Black* v. *FDIC*, 640 F. 2d 699 (5th Cir. 1981); *FDIC* v. *Smith*, 466 F. Supp. 843 (N.D. Ga. 1979); *FDIC* v. *Kucera Builders, Inc.*, 503 F. Supp. 967 (N.D. Ga. 1980); *Austin* v. *FDIC*, CIV 1-78-33 (E.D. Tenn. Sept. 27, 1979).[4]

4. Petitioners' related claim (Pet. 15-17) is that Section 1823(e) is limited to agreements that involve a secret transaction between the bank and its customers designed to deceive the bank's creditors. This is based on the purported intent of Congress, in enacting Section 1823(e), to codify this Court's holding in *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447 (1942), which involved a secret agreement. Petitioners' argument is without merit.

First, if Congress had intended to limit the scope of Section 1823(e) to the exact facts in *D'Oench*, it would not have chosen the expansive language it did. The protective provision applies to *any* agreement that tends to defeat the FDIC's interest in assets acquired under Section 1823(e). Since the statute, by its terms, plainly applies to the joint venture agreement asserted by petitioners, there is no basis for their assertion that Congress intended an implied limitation that would protect them. See *Barrett* v. *United States*, 423 U.S. 212, 217 (1976).

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[4]Petitioners err in claiming (Pet. 12-13) that Section 1823(e) should be limited to agreements between failed banks and their customers because that was the situation involved in *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447 (1942). Courts interpreting *D'Oench* have consistently applied it to third party agreements. See, *e.g.*, *FDIC* v. *Hoover-Morris Enterprises*, 642 F. 2d 785 (5th Cir. 1981); *FDIC* v. *Disterhoft*, No. 144-161 (Wis. Cir. Ct. Dec. 29, 1977); *FDIC* v. *Alward*, No. 144-156 (Wis. Cir. Ct. Dec. 29, 1977); *FDIC* v. *Slabaugh*, No. 144-180 (Wis. Cir. Ct. Dec. 5, 1977).

Moreover, petitioners' claim that this agreement is not within *D'Oench* is based on an unduly narrow interpretation of that decision. The Court in *D'Oench* did not limit its holding to actual deception. Instead, the Court stated (315 U.S. at 459):

> Furthermore, the fact that creditors may not have been deceived or specifically injured is irrelevant. As we held in *Deitrick* [v. *Greaney*, 309 U.S. 190, 198 (1940)], it is the "evil tendency" of the acts to contravene the policy governing banking transactions which lies at the root of the rule.

The test enunciated by this Court in *D'Oench* clearly demonstrates that if a debtor in any way helps to place an asset on a bank's records that is misleading or would tend to have a misleading effect, he is estopped to assert it against the FDIC:

> The test is whether the note was designed to deceive the creditors [of the Bank] or the public authority, or would tend to have that effect. It would be sufficient in this type of case that the maker lent himself to a scheme or arrangement whereby [the FDIC] *was or was likely to be* misled.

315 U.S. at 460 (emphasis added).

Petitioners executed a note that was freely negotiable. They knew or should have known that the note could be conveyed to a bank or any other person or entity. Yet they failed to reduce the alleged joint venture agreement to writing or even allude to it in the note. They put the note into the stream of commerce knowing that a buyer would have no way of learning that the note was worth less than its face value because it was subject to their alleged oral agreement with HMC. Thus, they "lent [themselves] to a scheme or arrangement whereby [the FDIC] * * * was or was likely to be misled." *D'Oench, Duhme & Co.* v. *FDIC, supra*, 315

U.S. at 460. Even assuming that Section 1823(e) is limited to the situations found offensive under *D'Oench*, petitioners' claim therefore should be barred.[5]

5. Finally, petitioners challenge (Pet. 17-22) the constitutionality of Section 1823(e), contending that due process required notice and a hearing at the time HMC transferred a partial interest in the note to HNB, because petitioners were deprived of their right of setoff at that time. This argument is frivolous.

The government was not involved in the transfer of the note from the mortgage corporation to the bank. Thus, the government could have no obligation to supply petitioners with contemporaneous notice of that event. If petitioners had wanted to protect themselves from a surprise transfer of the note, they should have included a provision requiring the mortgage corporation to supply them with notice or requiring their consont to any assignment.

Nor was there any reason to hold a hearing when the FDIC acquired the note. As the court of appeals held (Pet. App. A-26), the subsequent judicial determination of the applicability of Section 1823(e) provided petitioners with the process to which they were due on that issue. See *FDIC* v. *Lesselyoung*, 476 F. Supp. 938, 945 (E.D. Wis. 1979), aff'd, 626 F. 2d 1327 (7th Cir. 1980).

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[5] *FDIC* v. *Meo*, 505 F. 2d 790 (9th Cir. 1974), cited by petitioners (Pet. 15, 17), supports FDIC's position in this regard, for the court there indicated that the mere negligence of a debtor in creating a misleading asset is sufficient to estop the debtor under *D'Oench*:

> We conclude that a bank borrower who was neither a party to any deceptive scheme involving, *nor negligent with respect to*, circumstances giving rise to his claimed defense to his note is not estopped from asserting such defense against the bank's receiver.

505 F. 2d at 793 (emphasis added; footnote omitted).

Assuming that petitioners are actually complaining that Section 1823(e) unreasonably terminates their rights, the court of appeals also correctly rejected this argument (Pet. App. A-27 to A-28). Congress certainly has the power to adopt a limited measure designed to protect assets acquired by the FDIC. In this regard, petitioners could have prevented the application of Section 1823(e) by simply reducing their alleged joint venture agreement to writing and incorporating it by reference on the face of the note and security deed. Since the statute strikes a reasonable accommodation between the need to protect the FDIC and the property interests of debtors such as petitioners, it plainly is constitutional.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Petitioner's Reply Brief

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No. 81-1184

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

CHATHAM VENTURES, INC., ET AL., PETITIONERS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE ELEVENTH CIRCUIT

REPLY BRIEF OF THE PETITIONERS

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QUESTIONS PRESENTED

(A) Questions presented for review.

The issue is whether the District Court committed error in its ruling on the Motion for Summary Judgment in favor of the Appellee, FDIC, on the applicability of 12 U.S.C.A. 1823(e), thereby precluding Appellants, Scott Thompson and Laurie K. Abbott, from bringing their case for set off to trial because:

i) the asset was not purchased by FDIC in conjunction with the saving of an insured bank,

ii) the asset was not purchased from an insured bank,

iii) the maker/obligor of the note was not a customer of an insured bank,

iv) the maker/obligor did not lend himself to any deceptive scheme that overstated the assets of the bank.

If 12 U.S.C.A. 1823(e) does apply, then the issue is whether Appellants have been deprived of a valuable property right, without

notice and hearing, in violation of the due process clause of the Fifth Amendment to the United States Constitution and in contravention of the following decisions of the United States Court of Appeals for the Fifth Circuit and the Supreme Court of the United States:

Hornsby v. Allen, 326 F. 2d 605 (5th Cir. 1964);

Mathews v. Eldridge, 424 U.S. 319, 47 L.Ed. 2d 18, 96 S.Ct. 893 (1976);

Schroder v. N. Y., 371 U.S. 208, 9 L.Ed. 255, 83 S. Ct. 279, 89 A.L.R.2d 1398 (1962);

Mullane v. Central Hanover Bank & Trust Company, 339 U.S. 306, 94 L.E. 865, 70 S. Ct. 652 (1949).

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. 81-1184

CHATHAM VENTURES, INC., ET AL., PETITIONERS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF OF THE PETITIONERS

OPINION

The opinion of the court of appeals (Pet. App. A-15 to A-41) is reported at 651 F.2d 355. The opinion of the district court (Pet. A-1 to A-11) is not reported.

JURISDICTION

The Judgment of the Court of Appeals for the Fifth Circuit was made and entered on July 20, 1981. A Petition for Rehearing was filed on August 3, 1981, denied by Order dated September 11, 1981. The Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

ARGUMENT

1. Respondent argues (Res. 4, 5) that although neither the Bank nor FDIC were a holder of the note the 97.45% interest was an "asset" within the statute which is all that is required.

This is not all that is required by the statute. Although the FDIC's partial interest in the note was not worthless, it was an unsecured interest. Moreover, it was not the type of interest that would support a suit by the FDIC alone. Graham v. Southern Railway, 173 Ga. 573, 161 SE 125 (1931). However, when the FDIC acquired a holder status in the note the asset suddenly became more valuable simply because of the application of Section 1823(e). Therefore, the effect of the decision of the court of appeals was to extend the protection of Section 1823(e) to the Hamilton Mortgage Corporation.

Respondent argues that the above contention is hypothesizing. However, Respondent seems to miss the whole point of Petitioners' argument. That Petitioners are unable to set off their claims against the note is solely attributable

to Section 1823(e) and not to the insolvency of HMC. If HMC tried to collect on the note, petitioners could have interposed their defenses and counterclaims as a set off against the note notwithstanding HMC's insolvency. Under the present decision of the court of appeals, HMC came under the protection of Section 1823(e) thus avoiding their liability for breach of the joint venture agreement.

Furthermore, respondent attempts to characterize petitioners' claim as dubious (Res. 5) based upon their opinion of the Georgia Statute of Frauds in Code Ann. § 20-401(4)(5) which provides in part:

> "To make the following obligations binding on the promisor, the promise must be in writing, signed by the party to be charged therewith, or some person by him lawfully authorized, viz:
>
> "4. Any contract for sale of lands, or any interest in, or concerning them.
>
> "5. Any agreement (except contracts with overseers) that is not to be performed within one year from the making thereof."

However, petitioners' claim clearly comes

within an exception to the Georgia Statute of Frauds under Ga. Code Ann. § 20-402. This Section provides:

> "The foregoing section does not extend to the following cases, viz.:
> 1. When the contract has been fully executed.
> 2. Where there has been performance on one side, accepted by the other in accordance with the contract.
> 3. Where there has been such part performance of the contract as would render it a fraud of the party refusing to comply, if the court did not compel a performance.

As set forth in the petition for Writ of Certiorari, there is no doubt that petitioners performed their part of the joint venture agreement (Pet. 2, 3) and HMC accepted the benefits thereof. Under Ga. Code Ann. § 20-402(2), (3) the statute of Frauds would not apply to petitioners' claim.

This proposition is well supported by Georgia case law. Crosby v. Jones, 241 Ga. 558, 246 SE2d 639 (1978); Consumers Financing Corporation v. Lamb, 217 Ga. 359, 360(3), 122 SE2d 101 (1961); Williams v. Southland Corporation, 143 Ga. App. 111, 237 SE2d 639 (1977); Smith v. Moeller, 132 Ga. App. 184, 207 SE2d 669 (1974);

Dawn Memorial Park, Inc. v. Southern Cemetary Consultants of Georgia, Inc., 115 Ga. App. 180, 181(3), 154 SE2d 258 (1967).

Furthermore, it is a question for the jury as to whether there was part performance when the evidence tends to prove such performance. Richards v. Plaza Hotel, 171 Ga. 827, 156 SE 809 (1931), Bryan v. Southwestern R. Co., 37 Ga. 26, 31 (1867); Allen & Bean v. American Bankers Insurance Company of Florida, 153 App. 617, 266 SE2d 295 (1980).

Moreover, in Georgia joint venture agreements do not come within the Statute of Frauds at Ga. Code Ann. 20-1401(4) relating to the sale of land or an interest in lands. Manget v. Carlton, 34 Ga. App. 556(1); 13 E.G.L., Frauds, Statute of, § 32. This proposition is in accord with the greater weight of authority, 49 Am. Jur., Statute of Frauds, §200, §220.

Contrary to Respondent's assertions there is no state law impediment to the prosecution of petitioners' claim. But for the existence of Section 1823(e) the case would have gone to

a jury.

2. Respondent contends that the court of appeals was correct in holding that the acquision of 2.55% interest was "part of a transaction" to protect "the FDIC's earlier purchase of an asset of an insured bank" and such acquisition was proper within its incidental powers under 12 U.S.C.A. 1819.

As set forth in the petition for writ of certiorari (Pet. 10-12) Section 1823(e) requires that an asset be purchased from an insured bank. The FDIC purchased the note from HMC, a private corporation. While the FDIC had the right or power to purchase the 2.55 percent interest from HMC, it did not purchase it under the protection of Section 1823(e) (Pet. 11).

Respondent also contends that the situation in the case sub judice is unlikely to recur and the decision of the court of appeals is reasonable and has a very limited reach and, therefore, review by this Court is unwarranted (Res. 6).

This reasoning is erroneous for several

reasons. First, in these times of high interest rates and tight money supplies, the situation constantly recurs. Second, if the decision of the Court of Appeals is allowed to stand the FDIC would resolve the problem by purchasing the remaining interest from a non-banking concern simply because the commercial paper would be more valuable to the FDIC stripped of defenses or claims of the makers than to the sellers of the note. This is evidenced by the instant case wherein the FDIC purchased the note with impunity, fully aware of the defenses of petitioners. Third, for reasons set forth by petitioners, the decision of the court of appeals is unreasonable and has extremely broad application. As Judge Clark held in his concurring opinion (Pet. App. A28-A41), ". . . I do not believe that the statute reaches as far as the majority opinion takes it. Such a reach permits impairment of contracts and in my opinion was never intended by Congress."

3. On pages 12-14 of the petition for writ of certiorari, petitioners contend that

Section 1823(e) requires that the maker/obligor of the note be a customer of an insured bank. Respondent takes issue with petitioners contending that according to the language of the statute any agreement not complying with the statute may not be asserted. (Res. 6) However, the statute is silent on this point. The intent of Congress is based upon this Court's decision in D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, 86 L.Ed. 956, 62 S.Ct. 676 (1942), and its progeny. To quote from Representative Walters during the Congressional debate surrounding adoption of the statute is useful at this point:

> "Mr. Chairman, under § 13, Paragraph (e) of this measure, as amended, certain conditions for the first time are imposed upon the bank in the event agreements are entered into between customers of the bank and the bank. Prior hereto . . . it was believed that all legal agreements entered into by the bank and obligor were binding on the corporation. Under the language of the Bill this agreement must be entered into simultaneously with the recording and other conditions . . . it was never an intention of Congress to give the corporation a stronger position than that of the bank . . . in the absence of fraud." (86 Cong. Record 10731 (1950)). (emphasis supplied)

It is plain that Congress intended the statute to apply only to agreements between customers of the bank and the bank.

Furthermore, as Judge Clark stated, ". . . I do not believe Congress intended the statute to reach an agreement made between an obligor and an obligee which contains covenants on the part of the obligee as well as the obligor, arising in transactions that do not involve a national bank at the time of the making of the loan agreement." (Pet. App. A-32)

4. Petitioners claim that Section 1823(e) was designed to apply to agreements in which the maker lent himself to a scheme or arrangement whereby the FDIC was misled. In the instant case the FDIC was aware of petitioners' defenses long before it acquired the note (Pet. 19).

Respondent claims that petitioners by executing a note that was freely negotiable and placing the note into the stream of commerce, lent themselves to a scheme or arrangement whereby the FDIC was or was likely to be misled. (Res. 8).

However, when petitioners entered into the joint venture agreement, because of the funding obligations of HMC, they never thought that HMC would transfer a partial interest in the note to HNB and so on. As Judge Clark put it, "The obligor should not be required to anticipate the FDIC as a future assignee with the defenses contained in the statute." (Pet. App. A-32)

Furthermore, respondent seems to ignore the realities of modern commercial transactions. Real Estate developments are most valuable and successful when the potential for syndication exists. In order for this to occur, the notes must be freely negotiable. Developers are not going to impede the negotiability of notes with restrictions on its transfer.

The fact remains that petitioners did not lend themselves to any fraudulent and deceptive scheme. The intent of Congress is based upon this Court's decision in the D'Oench (supra) case. The cited exerpts from the Congressional Record show that it was not the intent of Con-

gress to give the corporation (FDIC) a stronger position than the bank in the absence of fraud.

5. Respondent argues that the government was not involved at the time of the transfer of the note from HMC to HNB and, therefore, had no obligation to supply petitioners with notice of the transfer.

However, the government was involved from the inception because banks are heavily regulated. The government regulation directly approves the challenged practice of the Banks and the FDIC in not giving notice of the transfer of the note. Therefore, there is state action intertwined with this practice.

Respondent (Res. 9) contends that there wasn't any reason to hold a hearing when the FDIC acquired the note. FDIC v. Lesselyoung, 476 F. Supp. 938, 945, (E. D. Wis. 1979) was cited for the proposition that subsequent judicial determination of the applicability of Section 1823(e) provided petitioners with the process to which they were due on that issue.

However, it is clear that subsequent judicial determination did not provide petitioners

due process because petitioners were unable to raise their defenses because they had failed to comply with the statute when the note was acquired by the bank. It was only at this point that petitioners could have complied. Therefore, at this point petitioners should have been given notice of the transfer.

Furthermore, the Lesselyoung, supra, case is totally inapplicable to the present case. In Lesselyoung, supra, the makers of the note dealt directly with the bank at all times and were directors of the bank. They were privy to all information concerning the poor and deteriorating condition of the bank. They had every opportunity to comply with Section 1823(e). On the other hand, petitioners never dealt with HNB and never knew the partial interest in the note was transferred to the bank until long after it was declared insolvent and a partial interest in the note was purchased by the FDIC. Based on the above analysis, petitioners feel that the Lesselyoung, supra, case was erroneously applied to the case sub judice.

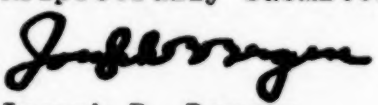
CONCLUSION

Respondent, who had notice of the defenses from the Comptroller of the Currency prior to purchasing an undivided interest in the note and had notice from petitioners, prior to endorsement of the note, now contends that petitioners, who had no notice of the assignment to HNB, are barred from all defenses because they failed to comply with the cited provisions of Section 1823(e). It is respectfully submitted that Respondent is in error in these contentions as set forth hereinbefore.

Furthermore, there is no state law impediment to the prosecution of petitioners' claim. Petitioners clearly come within the statutory exception to the Georgia Statute of Frauds, by their performance under the joint venture agreement. As the District Court held and as Respondent admitted in its brief, Petitioners had made out a case under the theory of joint venture but the agreement failed to meet the requirements of 12 U.S.C. 1823(e).

For the reasons set forth the petition for a writ of certiorari should be granted.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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